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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 536

W. H. BRINTON,

Petitioner,

vs.

THE FEDERAL LAND BANK OF BERKELEY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. D. SKEEN,
E. J. SKEEN,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Statement of case	1
Questions presented	8
Reasons relied upon for granting writ	9
Prayer for writ	11
Brief in support of petition	12

Table of Cases Cited

Bernards v. *Johnson*, 86 L. Ed. 14	13
Borchard v. *California Bank*, 310 U. S. 311, 84 L. Ed. 1222	9, 12
Bowman v. *Loperena*, 311 U. S. 262, 85 L. Ed. 177	14
Brinton v. *Federal Land Bank of Berkeley*, 129 F. (2d) 740	11
Byerly v. *Union Joint Stock Land Bank*, 310 U. S. 1, 84 L. Ed. 1041	13
John Hancock Mutual Life Ins. Co. v. *Bartels*, 308 U. S. 180, 84 L. Ed. 176	8, 9
Kalb v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370	8, 10
Mahaffey, In re, 120 F. (2d) 292	10, 12
Mulligan v. *Federal Land Bank of Omaha*, 129 F. (2d) 438	10, 12
Sandusky v. *First National Bank*, 23 Wall. 289, 23 L. Ed. 155	10
Union Joint Stock Land Bank v. *Byerly*, 310 U. S. 1, 84 L. Ed. 1041	12
Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 81 L. Ed. 537	10, 12, 13
Webster v. *Barnes Banking Co.*, 113 F. (2d) 1003	13
Windsor Square Development Co., In re, 91 F. (2d) 493	10, 13
Wright v. *Logan*, 315 U. S. 139, 86 L. Ed. 443	10
Wright v. *Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. Ed. 1490	10, 14
Wright v. *Union Central Life Ins. Co.*, 311 U. S. 273, 85 L. Ed. 184	10

Statutes Cited

Bankruptcy Act, Sec. 24(c)	12
Judicial Code, Sec. 240 (28 U. S. C. 347)	12

SUPREME COURT OF THE UNITED STATES

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W. H. BRINTON,

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vs.

THE FEDERAL LAND BANK OF BERKELEY.

PETITION FOR WRIT OF CERTIORARI.

The petition of W. H. Brinton respectfully shows to the Court:

That on the 4th day of September, 1933, he filed his petition in the District Court of the United States for the District of Utah praying for relief under Section 75 of the Bankruptcy Act together with Schedule "A" showing debts aggregating $16,335.00 and Schedule "B" showing assets valued at $28,080.00.

On March 6, 1937, upon petition of the Federal Land Bank of Berkeley, the court made an order authorizing it to institute proceedings for the foreclosure of a mortgage, providing, however, that the order should not take effect until April 1, 1937. On July 2, 1937, the district court,

upon an amended petition praying for relief under subsection (s) of section 75 of the Bankruptcy Act, adjudged the debtor a bankrupt and referred the matter to a conciliation commissioner. The conciliation commissioner caused the property to be appraised pursuant to the petition, fixed the annual rental at $550.00, reported the appraisal and made a recommendation that proceedings against the debtor be stayed by the district court.

On January 26, 1938, the Federal Land Bank filed a petition praying that the court vacate its order of adjudication under section 75 (s) of the Bankruptcy Act, and adjudge that because the State court had taken jurisdiction over the debtor and his property, under previous permission, that the adjudication under section 75 (s) did not vest jurisdiction in the Bankruptcy Court to further administer said property.

An order to show cause was issued and on February 7, 1938, pursuant to the petition and order to show cause, the court made the following order:

> "It is hereby ordered:
>
> (1) That C. W. Sorenson, Conciliation Commissioner for Sanpete County, Utah, is hereby ordered and directed to forthwith transmit and deliver to said, The Federal Land Bank of Berkeley, to be credited upon the mortgage indebtedness owing by the above named debtor to said bank, the sum of $623.29, represented by the following checks now in the possession of the said conciliation commissioner to-wit: One check in the amount of $449.97 drawn by the said bank to the order of said conciliation commissioner and transmitted to said conciliation commissioner on or about August 26, 1937 as a conditional refund of certain payments made by said debtor; one check of the Gunnison Sugar Company for the sum of $23.32 and drawn to the order of said bank and said debtor; and one check

of said debtor for the sum of $50.00 drawn to the order of said bank.

(2) That said debtor on or before June 15, 1938, shall pay to the said Federal Land Bank of Berkeley, the sum of $150.00 to be credited on said mortgage indebtedness and on or before November 30, 1938 said debtor shall pay to said bank such additional sum or sums as will, together with said sum of $150.00, equal the amount of the interest for one year upon the entire mortgage indebtedness owing to said bank from said debtor.

(3) That said debtor on or before November 30, 1938, shall pay all state, county and other public taxes and assessments for the year 1938 upon the premises and property covered by the mortgages from said debtor to said bank.

(4) That the said debtor, on or before November 30, 1938 shall pay to said bank the further sum of $750.00 to be credited upon the said mortgage indebtedness.

(5) That the said, The Federal Land Bank of Berkeley, upon the neglect or failure of said debtor to comply with either or any of the terms or provisions of this order, may and shall proceed with and prosecute its pending action or actions for the foreclosure of its said mortgages and the sale or sales of the premises and property in such mortgages described according to law, and that upon such neglect or failure of said debtor to comply with the provisions hereof, all jurisdiction of this court over said property in this proceeding, shall wholly terminate and be at an end.

(6) In the meantime, let this matter be continued to November 30, 1938, provided that the said Federal Land Bank of Berkeley may, at any time prior thereto, upon failure of the said debtor to comply with any of the provisions hereof, bring said matter on for final hearing and disposition.

Dated February 7, 1938.

TILLMAN D. JOHNSON, *Judge.*"

On May 15, 1939, upon the petition of the Federal Land Bank of Berkeley, the court ordered that:

> "The Federal Land Bank of Berkeley be and it is hereby authorized, permitted and directed to proceed with and prosecute its pending action or actions or to institute and prosecute such action or actions, for the foreclosure of its said mortgages from said debtor in a court of competent jurisdiction of the State of Utah, and the sale or sales of the premises and property in said mortgages described according to law, all jurisdiction of this court over said premises and property in said mortgages described being hereby relinquished and terminated.
>
> Dated May 15, 1939.
>
> TILLMAN D. JOHNSON, *Judge.*"

On February 23, 1940, at a hearing upon an order to show cause at which the debtor and the Federal Land Bank of Berkeley were represented by their respective attorneys, the court directed the entry of the following minute order:

> "On this 23rd day of February, 1940, debtor appearing by E. J. Skeen, his attorney, and Federal Land Bank of Berkeley by W. J. Mitchell, its attorney, and it appearing to the court that the above named debtor was adjudicated a bankrupt under sub-section S of Section 75 of the Bankruptcy Act on July 2, 1937, and the matter was referred to C. W. Sorenson, Referee and Conciliation Commissioner. It further appearing that said Conciliator filed the report of appraisers and fixed the annual rental of the property and recommended that proceedings be stayed in accordance with the act, and it is ordered that the recommendations of said referee be and the same is hereby approved nunc pro tunc as of August 31, 1937.
>
> Good cause appearing it is ordered that hearing on order to show cause be continued until March 2, 1940." (R. 10.)

On March 5, 1940, the debtor filed a petition for the reappraisal of his property pursuant to the provisions of subsection (s) of section 75 of the Bankruptcy Act, and on March 6, 1940, the court re-referred the matter to the conciliation commissioner for the reappraisal of the property as provided by law. Appraisers were appointed and made their return, and on January 20, 1941, the debtor filed his petition praying that the court set the matter for hearing, and upon the hearing, make an order fixing the time (R. 10, 11) for the payment of the appraised value of the property, and upon payment thereof, directing that it be turned over to the debtor free and clear of encumbrances.

On March 8, 1941, it was stipulated by the debtor and the Federal Land Bank of Berkeley, that pursuant to the order of March 6, 1937, the Federal Land Bank instituted proceedings against the debtor for the foreclosure of its mortgage; procured judgment against him for the sum of $12,957.44 and on August 28, 1937, the mortgaged property was sold and the plaintiff purchased the same for the sum of $12,628.03, and on March 20, 1940, the statutory period of redemption having expired, the sheriff of Sanpete County, Utah, executed and delivered to plaintiff, a sheriff's deed purporting to convey debtor's property to the Federal Land Bank of Berkeley, and that in the foreclosure proceedings (R. 13) the bank had incurred expenses and paid taxes aggregating $2,211.71.

On March 8, 1941, the debtor filed another petition for reappraisal of the property and upon the hearing of the petition, the Federal Land Bank appeared specially to object to the jurisdiction of the court.

In the special appearance the bank recited the proceedings theretofore taken substantially as hereinabove set forth and prayed that the bankrupt's petition for reappraisal be denied for the reason that the bank, at all times since the

20th day of March, 1940, had been the owner of the property, and that the debtor be enjoined from further harassing the bank by asserting ownership of the property. The court made findings of fact, reciting the history of the proceedings as hereinabove related, and continued:

> "5. That said bankrupt failed to make the payments provided in said order of February 7, 1938, and on May 15, 1939, upon due hearing, the bankrupt being present in person and by counsel, this Court made and entered an order again authorizing and directing said Bank to proceed with said foreclosure actions and the sale of said property according to law, and further relinquishing and terminating all jurisdiction of this Court over said property; that no appeal has been taken from said order;
>
> 6. That on or about February 23rd, 1940, this Court on its own motion made and entered the following order, providing among other things, that 'It further appearing that said Conciliator filed the report of appraisers and fixed the annual rental of the property and recommended that proceedings be stayed in accordance with the Act, and it is ordered that the recommendations of said referee be and the same is hereby approved nunc pro tunc as of August 31, 1937';
>
> 7. That since the said order of March 6, 1937, said Bank has made substantial outlays for taxes, water assessments and other expenses for the protection and preservation of said property and the liens formerly held by said Bank thereon an amount in excess of $1,200.00;"

and concludes:

> "1. That since the making and entry of said order herein of March 6th, 1937, and in reliance thereon, the said Bank has changed its status from that of lienholder to owner of said property, and said Bank cannot now be replaced in its former status and rights.

2. That said bankrupt's said petition for reappraisal as to the property hereinafter described should be denied; that said bankrupt has no interest in or to said property, or any part thereof; and that this Court has no jurisdiction over the said property, or any portion of the same, in this proceeding or otherwise.

Order.

Now, therefore, pursuant to and in accordance with the foregoing findings of fact and conclusions of law,

It is ordered, adjudged and decreed that the bankrupt's said petition for reappraisal as to the property hereinafter described, be and the same is hereby denied; that said bankrupt has no interest in or to said property, or any part thereof; and that this Court has no jurisdiction over the said property or any portion of the same, in this proceeding or otherwise.

The premises and property referred to in this order are situated in Sanpete County, Utah and are described as follows, to-wit: (Then follows a description of the real estate.)

Dated this 4th day of October, 1941. (R-23).

TILLMAN D. JOHNSON, *Judge.*"

The debtor duly appealed to the Circuit Court of Appeals from the order of March 4, 1941, and on the 30th day of June, 1942, the court handed down its opinion affirming the judgment of the district court. A petition for re-hearing was filed within the time provided by the rules of the Court and an order extending the time to petition for a re-hearing, which order of extension was made, before the expiration of thirty days provided for by the rules of the court, and on September 2, 1942 the petition for re-hearing was denied. The court held that from and after May 15, 1939, the court had no jurisdiction over the debtor or his property and was without power to administer the same in ac-

cordance with the provisions of section 75, subsection (s). The court said:

> "Obviously, the court could not divest itself of jurisdiction and exercise it at the same time, or exercise it after a denial of it. We hold that the order of May 15, 1939 relieved the mortgagee of any disability to pursue his foreclosure suits arising out of the pendency of the bankruptcy proceedings, and left them free to prosecute their foreclosures in the state court. However erroneous the order, the remedy for its correction was by timely application for rehearing or timely appeal.
>
> Bernards v. Johnson, supra.
>
> Therefore since the court had no jurisdiction over the property from and after May 15, 1939, it had no jurisdiction to entertain the petition for reappraisement, and this appeal does not reach the erroneous order of this court in refusing to administer the same, as provided by section 75, sub. s (3).
>
> The judgment is affirmed."
>
> *Brinton* v. *Federal Land Bank of Berkeley,* 129 F. (2d) 740.

The questions presented by this application are briefly stated as follows:

1. Did the district court have jurisdiction and power to correct or rescind the order of May 15, 1939 on February 23, 1940 and to make the proceeding conform to the statute as construed in,

> *John Hancock Mutual Life Insurance Company* v. *Bartels,* 308 U. S. 108, decided December 4, 1939, 84 L. Ed. 176

and

> *Kalb* v. *Feuerstein,* 308 U. S. 433, 84 L. Ed. 370, decided January 2, 1940

by making the order of February 23rd approving the report of the conciliation commissioner fixing the rent to be paid

by the debtor and staying proceedings for the period of three years?

2. If the court had the power in the then pending proceeding to set aside its erroneous orders, was that power conditioned upon application of either party or could the correction of the erroneous orders be made by the court of its own motion?

3. Having jurisdiction over the debtor and his property, was it within the power of the court to relinquish and terminate that jurisdiction by the order of May 15, 1939, and thereby to divest itself of the power to comply with the statute and the decisions of this court?

4. If the order of February 23, 1940, approving the recommendation of the conciliation commissioner and staying proceedings against the debtor was erroneous in the absence of an appeal, was it binding on the debtor and creditors alike?

5. Is the Federal Land Bank of Berkeley estopped from questioning the jurisdiction of the court because of its having participated in the proceeding leading up to the entry of the order staying proceedings against the debtor?

The writ of certiorari should be granted for the following reasons:

1. Because the Circuit Court of Appeals has held that the district court by the making and entry of the order of May 15, 1939, surrendered its jurisdiction over the property contrary to the express provisions of section 75 of the Bankruptcy Act and contrary to the rulings of this court in the following cases, to-wit:

John Hancock Mutual Life Insurance Company v. *Bartels,* 308 U. S. 180, 84 L. Ed. 176;

Borchard v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222;

Kalb v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370;
Wright v. *Union Central Life Ins. Co.*, 304 U. S. 502, 82 L. Ed. 1490;
Wright v. *Union Central Life Ins. Co.*, 311 U. S. 273, 85 L. Ed. 184;
Wright v. *Logan*, 315 U. S. 139, 86 L. Ed. 443.

2. Because the decision of the Circuit Court of Appeals and the order of the district court are contrary to the express provisions of the statute and the decisions of this Court.

3. Because the decision of the Circuit Court of Appeals is contrary to the decisions of the Circuit Court of Appeals of other circuits in:

In re: Mahaffey, C. C. A. 2nd Cir., decided June 1942, 120 F. (2d) 292;
Mulligan v. *Federal Land Bank of Omaha*, C. C. A. 8th Cir., 129 F. (2d) 438;
In re: Windsor Square Development Company, C. C. A. 9th Cir., 91 F. (2d) 493;

upon the question of the power of the Bankruptcy Court, during the pendency of the proceeding to correct its orders. It is also contrary to the judgment of the Circuit Court of Appeals for the Tenth Circuit, in

Webster v. *Barnes Banking Company*, 113 F. (2d) 1003;

and it is contrary to the decisions of this Court in:

Wayne United Gas Company v. *Owens-Illinois Glass Company*, 300 U. S. 131, 81 L. Ed. 557 and
Sandusky v. *First National Bank*, 23 Wall. 289, 23 L. Ed. 155.

4. Because the Circuit Court of Appeals in this case has made a distinction in the application of the rule to the effect

that if the erroneous order pertains to its jurisdiction over property, the court itself has no power to correct its order. This distinction has no sound basis either in the statute or in the decisions of this Court.

5. Because the question is of general importance in that the court may deprive a debtor of the rights expressly given by the statute and the decisions of this Court to redeem his property by making an order relinquishing jurisdiction over the property contrary to the law laid down in all of the decisions of this Court. The decision of the Circuit Court of Appeals is published.

Brinton v. *Federal Land Bank of Berkeley*, 129 F. (2d) 740.

WHEREFORE petitioner prays that a writ of certiorari be issued by this Court directing that all proceedings in the Circuit Court of Appeals for the Tenth Circuit be certified and that the judgment of the Circuit Court of Appeals and of the District Court of the United States for the District of Utah be reversed and that the petitioner be granted all of the rights provided by the statutes.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioner.

SUPPORTING BRIEF.

The authority for issuing the writ upon this petition is given by Section 240 of the Judicial Code, 28 U. S. C. A. 347, 342 P. 359 and by Section 24 (c) of the Bankruptcy Act.

The writ should be issued because the United States Circuit Court of Appeals for the Tenth Circuit in holding that the court could not, after entry of the order of May 15, 1939 and while the proceeding was yet pending in the district court, lawfully make the order of February 23, 1940, re-asserting jurisdiction over the debtor's property. The order of May 15, 1939 was clearly erroneous. When this Court decided *John Hancock Mutual Life Insurance Company* v. *Bartels,* December 4, 1939 and *Kalb* v. *Feuerstein,* January 2, 1940 it, of course, became apparent to the district court that the order of May 15, 1939 was entirely out of line with the statute and the decisions of this Court and when, therefore, the matter first came before the court on February 23, 1940 the court made the order approving the report of the conciliation commissioner and staying proceedings as of August 31, 1937. The debtor may have petitioned the court to set aside the order of May 15, 1939 after the law was settled by this Court in the cases cited, and the Court would have the power to set aside the order and to stay proceedings.

Union Joint Stock Land Bank v. *Byerly,* 310 U. S. 1, 84 L. Ed. 1041;

Borchard v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222;

Wayne United Gas Co. v. *Owens-Illinois Glass Co.,* 300 U. S. 131, 81 L. Ed. 537;

In re Mahaffey, decided June 1942, 2d C. C. A., 120 F. 2d 292;

Mulligan v. *Federal Land Bank of Omaha,* 8th Cir., 129 F. 2d 438;

In re Windsor Square Development Co., 9th Cir., 91 F. 2d 493;

Webster v. *Barnes Banking Co.*, 10th Cir., 113 F. 2d 1003.

There is no reason why the Court could not, of its own motion, do what it could have done upon such an application. Furthermore, at the time the order of February 23, 1940 was made both the debtor and the Federal Land Bank were represented in court and were then presenting to the court an order to show cause which had theretofore been issued. No objection to the order was made. The question is presented as to whether an inferior court can, during the pendency of a proceeding in bankruptcy, correct its orders or judgments to conform to the judgments of this Court.

Wayne United Gas Company v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 81 L. Ed. 537.

is authority for such an order. It has been held in other Circuit Courts that such authority exists. See cases cited.

This is not like the case of *Byerly* v. *Union Joint Stock Land Bank*, 310 U. S. 1, 84 L. Ed. 1041, because in that case an order of the state court confirming a sale was made after the dismissal of the proceeding because of the unconstitutionality of the first subsection (s) of Section 75 of the Bankruptcy Act, and before the reinstatement under the second subsection (s). In the case now before the Court, the order of February 23, 1940, staying proceedings against the debtor was entered before the right of redemption had expired and before the sheriff's deed issued on March 20, 1940.

Bernards v. *Johnson*, 86 L. Ed. 14, is not in point for the reason that by the minute entry dated February 23, 1940, the court, in effect, set aside the order of May 15, 1939 purporting to relinquish its jurisdiction over the property. The right of redemption had not expired on February 23, 1940

and consequently a deed had not been issued. The minute entry of February 23rd must be construed as it was by the Circuit Court of Appeals as setting aside the order of May 15, 1939, hence the sentence in *Bernards* v. *Johnson,* reading:

> "Since the District Court refused to review these orders and decree out of time, the petitioners could not attack them in the Circuit Court of Appeals."

It is not applicable for the court did not refuse to set aside its order even though out of time. The statement in *Wayne United Gas Company* v. *Owens-Illinois Glass Company* that:

> "the fact that such a court has no terms, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended."

and that therefore:

> "A Federal District Court has power to set aside its order dismissing a petition for reorganization of a corporation under Section 77 (b) of the Bankruptcy Act and to rehear the cause notwithstanding the period by the Act allowed for appeal from the order has expired." and

Bowman v. *Loperena,* 311 U. S. 262, 85 L. Ed. 177, are applicable and controlling in this case.

A Federal District Court after it has erroneously authorized the institution of a foreclosure proceeding in the state court against a debtor under subsection (s) of Section 75 of the Bankruptcy Act may make a proper order restraining such foreclosure before the right of redemption has expired. As in the *Wayne United Gas Company* the Federal Land Bank knew of the status of the proceeding in the Federal Court by actually participating in the same. See *Wright* v. *Union Central Life Insurance Company,* 304 U. S. 502, 82 L. Ed. 1490.

This is not different from the case where the original petition under Section 75 of the Act is filed before the expiration of the period of redemption, or the case of a dismissal of an original proceeding and a permissible refiling after the dismissal of the original proceeding and before the expiration of the period of redemption. In either case the right of redemption exists and it is protected by the statute which "subjects all of the farmer debtor's assets, specifically including rights of redemption, to the jurisdiction of the bankruptcy court".

Elizabeth Wright and Charles C. Wright v. *Gusta Logan, Harriet Sawyer and Exia Logan Reese,* 315 U. S. 139, 86 L. Ed. 443.

It must be borne in mind that the District Court did not, by the order of May 15, 1939 or by any other order, dismiss the proceedings. It continued jurisdiction over the debtor and other property, and by the correcting order of February 23, 1940 reasserted its jurisdiction. It was clearly the duty of the court to make such an order.

The holding of the Circuit Court of Appeals that:

> "The court could not divest itself of jurisdiction and exercise it at the same time or exercise it after a denial of it."

is out of harmony with all of the cases. The court, having erroneously denied its own jurisdiction, obviously could correct the error the same as it could correct any other error.

Respectfully submitted,

J. D. Skeen,
E. J. Skeen.

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SUPREME COURT OF THE UNITED STATES

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W. H. BRINTON, PETITIONER,

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THE FEDERAL LAND BANK OF BERKELEY,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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INDEX

Subject Index

	Page
Brief in opposition to petition for writ of certiorari	1
Statement of petitioner's contention	1
Argument	1, 2, 3, 4, 5, 6
Conclusion	6

Table of Cases Cited

Bernards v. *Johnson*, 314 U. S. 19; 62 S. Ct. 30	1, 3, 6
Gagnon v. *U. S.*, 193 U. S. 451, 24 S. Ct. 510	3, 4
Union Joint Stock Land Bank v. *Byerly*, 310 U. S. 7; 60 S. Ct. 773	1, 3, 6
Wight v. *Nicholson*, 134 U. S. 136, 10 S. Ct. 487	3

Texts

42 C. J. 534, § 221b	3, 4
42 C. J. 535, § 222 (2)	4, 5
42 C. J. 532	5
42 C. J. 537	5

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RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The ground upon which petitioner contends he is entitled to a writ of certiorari can be stated succinctly as follows: Although on May 15, 1939, the District Court made an order relinquishing and terminating its jurisdiction over the mortgaged property, from which order no appeal was taken, the District Court set aside and vacated said order, out of time, when it entered its so-called nunc pro tunc order of February 23, 1940.

It must be conceded that unless said nunc pro tunc order had the effect claimed by petitioner, the decision of the Circuit Court of Appeals was correct under authority of *Union Joint Stock Land Bank* v. *Byerly*, 310 U.S. 7; 60 S.Ct. 773, and *Bernards* v. *Johnson*, 314 U. S. 19; 62 S. Ct. 30.

A brief resume of the pertinent facts and law will readily disclose the fallacy of the petitioner's contention.

On August 31, 1937, the Conciliation Commissioner recommended that the District Judge stay proceedings for three years. At that time the Judge took no action whatsoever on the recommendation. On May 15, 1939, the Judge made the order relinquishing and terminating the Bankruptcy Court's jurisdiction over the mortgaged property. On February 23, 1940, the Judge made the so-called nunc pro tunc order, the pertinent portion of which reads:

> "it is ordered that the recommendations of said referee be and the same is hereby approved nunc pro tunc as of August 31, 1937." (Tr. 10)

Petitioner seeks to have the order of February 23, 1940, construed as a rehearing granted by the District Judge out of time and by which the District Judge set aside and vacated his order of May 15, 1939. The order of February 23, 1940, was made on the *Court's own motion.* (Tr. p. 23. Finding No. 6.) It also shows on its face that it was another question which was before the Court on February 23, 1940, and in respect to which respondent's counsel was present. The last paragraph of the order reads:

> "Good cause appearing, it is ordered that hearing on order to show cause be continued until March 2, 1940." (Tr. 10)

Had the hearing been on the question of entering the nunc pro tunc order it is very evident that the matter would not have been continued.

We have been unable to find any authority under which a court may, upon its own motion, at the time set for hearing another matter, make an order which would in effect grant a rehearing and at the same time, without a hearing, set

aside and vacate a previous order terminating its jurisdiction over certain property.

The facts in this case do not show that the District Judge ever set aside and vacated the order of May 15, 1939, or ever *intended* to do so. They show just the opposite. On February 23, 1940, the Judge attempted to stay proceedings nunc pro tunc as of August 31, 1937. His sole intention was to supply an order he had previously failed to make. Had the stay order actually been entered on August 31, 1937, the order of May 15, 1939, would have been as effective, since it authorized the mortgagee to proceed with foreclosure, and terminated the Bankruptcy Court's jurisdiction over the property. The rule of the *Byerly* and *Bernards* cases would have been as applicable. Therefore, if we assume, without admitting, that the nunc pro tunc order of February 23, 1940, had any effect whatsoever, its effect was to stay proceedings as of August 31, 1937. The chronology would then be:

August 31, 1937—proceedings stayed;

May 15, 1939—*order authorizing foreclosure and terminating jurisdiction, from which no appeal was taken;*

September 30, 1939—foreclosure sale;

March 20, 1940—redemption period expired;

March 27, 1940—sheriff's deed delivered.

As a matter of fact, the order of February 23, 1940, had no effect whatsoever. *Wight* v. *Nicholson,* 134 U. S. 136, 10 S. Ct. 487; *Gagnon* v. *U. S.,* 193 U. S. 451, 24 S. Ct. 510. The rules pertaining to nunc pro tunc orders are well stated in 42 C. J. 534, 535, which we quote in part:

> "§ 221b. *Nunc pro tunc*—(1) *In General.* As a general rule, either on the application or motion of a party duly

entitled or by the court ex mero motu, an order may be entered nunc pro tunc to correct the entry of an order previously made not speaking the truth as to what was actually done or to make a record of what was previously done by the court and not then entered, especially where the result will be to effect or perfect an entry which should have been made as a matter of course and as a legal duty to prevent injustice . . . . . and the power to affect the operation of an order, or change its import by an order nunc pro tunc, should be exercised with caution and circumspection.

"§ 222 (2) *Necessity of Previous Order.* Where the court has wholly omitted to make an order, which it might or ought to have made, it cannot be made and entered nunc pro tunc after the time limited for making the order has expired; a nunc pro tunc entry cannot serve to supply the court's nonaction, to validate a void order, or to correct a decision however erroneous . . . ."

In *Gagnon* v. *U. S.*, *supra,* the court said:

"The power to recreate a record, no evidence of which exists, has been the subject of much discussion in the courts, and the weight of authority is decidedly against the existence of such power. We have examined a large number of authorities upon this point, and while they do not altogether harmonize in their conclusions, the practice in some states being much more rigid than in others, we have found none which supports the contention that a record may be created to take the place of one of which no written memorandum was made or entered at the time the original judgment was supposed to have been rendered."

In the instant case, the District Judge had neither attempted nor intended to make the stay order on August 31, 1937. He could not supply the omission by the so-called nunc pro tunc order of February 23, 1940. This case comes

squarely within the rule referred to in C. J. Section 222, above.

The petitioner contends that even though the order clearly shows that on February 23, 1940, the District Judge was attempting to do nothing but stay proceedings as of August 31, 1937, his inability to do so legally would result in an order staying proceedings as of the date of the attempt to make the nunc pro tunc order. The very name of such orders emphasizes the fact that they are retroactive in effect. When proper, they must relate back to "then." 42 C. J. 532, and cases cited.

In 42 C. J. 537 we find the following:

> "A nunc pro tunc entry of an order relates back and operates to make the order effective as of the date when it should have been entered;"

The District Judge had no intention to make the order effective on February 23, 1940. It is not the law that if a Judge intends to do one thing, but fails, his order will have some effect which was not in the mind of the Judge and which effect he did not intend. Without intending that the order should be effective as of February 23, 1940, it follows that the District Judge did not intend to set aside and vacate his order of May 15, 1939. If a judge has the power, on his own motion and without a hearing, to set aside such orders, it is submitted that the proof of such intention should be expressed in clear language and should not be left to inference.

That the District Judge did not intend to set aside and vacate the order of May 15, 1939, is affirmatively shown by the fact that in the findings in the order appealed from, dated October 4, 1941, he refers to the order of May 15, 1939, and says:

> "that no appeal has been taken from said order." (Tr. p. 23. Finding No. 5)

He also refers to the order of February 23, 1940. The order then states:

> "that said bankrupt has no interest in or to said property or any part thereof; and that this Court has no jurisdiction over said property, or any portion of same, in this proceeding or otherwise."

The District Judge would not have made this order if by his order of February 23, 1940, he had intended to set aside and vacate his order of May 19, 1939.

As mentioned in petitioner's petition for writ of certiorari, on page 15, the Court's jurisdiction "over the debtor and *other* property" continued after the order of May 15, 1939. As to such *other* property, which was not subject to its mortgages, respondent naturally had no objection to the entry of the order of February 23, 1940, regardless of what effect it may have had, and would not appeal therefrom.

The inescapable conclusion is that the District Judge did not, by his order of February 23, 1940, intend to set aside or vacate his order of May 15, 1939, and that, since no appeal was taken by petitioner, the decision of the Circuit Court of Appeals was correct under authority of *Union Joint Stock Land Bank* v. *Byerly, supra,* and *Bernards* v. *Johnson, supra,* and the petition for writ of certiorari should be denied.

Respectfully submitted,

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